#

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 615 OF 2004

M/s. Hindustan Petroleum]
Corporation Limited]
a body corporate constituted]
under the Companies Act,1956]
having its registered office]
at 17, Jamshedji Tata Road,] ..Appellants
Mumbai 400 020](Ori. Deft. no.1)

versus

1. Dilip Prabhakar Dingorkar]
age 45 years, Occ : Business]
Residing at 907, Matruchhaya]
Sadan Tapal Naka, M.G. Road,]
Panvel, Taluka Panvel]
District Raigad]
2. M/s. Ideal Automobiles]
a partnership firm having its]
principal office of business]
and office at Opp: Bombay]..Respondents
Mercantile Bank, Post Panvel](No.1 Ori.Plff.
Tal: Panvel, District Raigad] No.2 Ori.Deft.2)

AND

SECOND APPEAL NO. 1281 OF 2004

M/s. Ideal Automobiles]
a partnership firm, having its]
principal place of business]
and office at Opp:Bombay]
Mercantile Bank, Post Panvel,]
Taluka Panvel, District Raigad]
through its partner]..Appellant
Shri Prakash Harkisandas] (Ori. Deft.
Gehani] No.2)

versus

1. Dilip Prabhakar Dingorkar]
age 45 years, Occ : Business]
Residing at 907, Matruchhaya]
Sadan, Tapal Naka, M.G. Road,]
Post & Taluka Panvel]
District Raigad]
2. M/s. Hindustan Petroleum]
Corporation Limited, a Body]
Corporate, constituted under]
the Companies Act, 1956,]
having its registered office]..Respondents
at 17, Jamshedji Tata Road,](No.1 Ori.Plff.
Mumbai 400 020]No.2 Ori.Deft.1)

Mr. M. D. Siodia and Ms. D. S. Retiwala i/b. Rustomji & Ginwalla Co. for the Appellants in First Appeal No. 615 of 2004 and for Respondent No.2 in Second Appeal No. 1281 of 2004.
Mr. Shrihari Anne (Senior Advocate) with R. S. Datar for the Respondent No.1 in both the Appeals.

Mr. V. Y. Sanglikar i/b. D. R. Singh for the Appellant in Second Appeal No. 1281 of 2004 and for Respondent No.2 in Appeal No. 615 of 2004.

CORAM : D. G. DESHPANDE,J.

DATE : 6TH MAY, 2005.

ORAL JUDGMENT :

1. Heard Mr. Sanglikar for the Appellants in Second Appeal No. 1281 of 2004 and for Respondent No.2 in Second Appeal No. 615 of 2004. Mr. Anne for the Respondent No.1 - Owner in both the Appeals. Mr. Siodia for the Appellants in First Appeal No. 615 of 2004 and for Respondent No.2 in Second Appeal No. 1281 of 2004.

2. I will be referring to the parties by their original nomenclature in the suit as plaintiff and defendants. Following substantial questions of law were formulated by Justice Kakade on 28.4.2004 :

(1) Was it right and proper for the Courts below to consider the material fact that the earlier suit being R.C.S. No. 120 of 1990 was barred by limitation and therefore, under Section 27 of the Limitation Act, the respondent - plaintiff's right to institute a suit for possession of the property had extinguished?

(2) Was it right and proper for the Courts below to hold that the present suit is not barred by limitation when the reliefs in earlier suit i.e. R.C.S. No. 120 of 1990 and the present suit i.e. R.C.S. No. 181 of 2000 are same and cause of action is same and reliefs claimed with respect to the suit property are same and when the earlier suit i.e. R.C.S. No. 120 of 1990 stands dismissed as being barred by the law of limitation.

(3) Whether the plaintiff could at the same time adopt two remedies for possession of the premises i.e. a writ petition challenging the orders passed in a suit filed for possession which came to be dismissed and during the pendency of the writ petition he could file a second suit on the same grounds the same cause of action?

(4) Whether the provisions of Section 3(1)(b) of

the Maharashtra Rent Control Act is unconstitutional and or ultra vires Articles 14 of the Constitution of India?

(5) The appellants submit that Civil Appeal No. 8017 of 1992 filed by Crompton Greaves Limited challenging Section 3(1)(b) of the Maharashtra Rent Control Act is pending before the Hon'ble Supreme Court of India and has not been decided as of date?

3. So far as Second Appeal No. 1281 of 2004 is concerned, it was not even admitted and Mr. Anne for the landlord - plaintiff raised a preliminary objection to the maintainability of the Second Appeal. He contended that from the original decree that was passed by the trial court M/s. Ideal Automobiles did not prefer First Appeal and did not challenge that order and therefore now they cannot be permitted to file Second Appeal. According to him therefore the Second Appeal is not maintainable. Mr. Sanglikar for M/s. Ideal Automobiles could not show any provision of law under which he could file Second Appeal when he not filed First Appeal at all. Therefore, objection of Mr. Anne is required to be upheld and this Second Appeal No. 1281 of 2004 is required to be dismissed before admission and accordingly it is dismissed. It is quite difficult that M/s. Ideal Automobiles can be heard as respondent in the Appeal No. 615 of 2004 supporting

the claimants contention of the appellant in that appeal.

4. The original plaintiff is the owner of the suit property i.e. his grand father was the original owner and Final Plot No. 211, Sub Plot No.7, Panvel, was let out on monthly rent of Rs.100/- for a period of 10 years. The lessee at that time M/s. Standard Vacuum Oil Company in course of time Hindustan Petroleum Corporation Limited (HPCL) came to be recognised as lessee and there is no dispute about that between the parties.

5. In 1990 owners of the property i.e. Respondent No.1 Dilip Dingorkar and his grand father filed a Civil Suit No. 120 of 1990 for possession of the suit property after terminating the tenancy of the defendants in that suit i.e. present appellant. (present appellants means HPCL because appeal No. 615 of 2004 only is being taken for hearing and other appeal i.e Second Appeal No. 1281 of 2004 being dismissed as not maintainable. The said suit for possession came to be dismissed by the Civil Judge, J.D. Panvel, on 10.11.1995.

6. The owners filed Civil Appeal. It was Civil Appeal No. 280 of 1995. It was dismissed on 9.11.11998 by Additional District Judge, Raigad, Alibag. Then the

owners filed Writ Petition No. 604 of 1999, which is still pending in this court.

7. Thereafter Respondent No.1 - Plaintiff again served the defendants with notice of termination dated 19.9.2000 calling upon them to vacate the property and deliver possession thereof. This notice was replied to by the present appellant on 23.10.2000 and then Regular Civil Suit No. 181 of 2000 came to be filed before Civil Judge, Senior Division, Panvel, for possession and mesne profits. That suit was opposed by the present appellant and also original defendant No. 2 Ideal Automobiles but that suit was decreed by the court on 13.12.2002. The appellant preferred an appeal before the District Court, Raigad, vide Civil Appeal No. 6 of 2003 but by judgment and decree dated 4.2.2004 that appeal came to be dismissed, hence this Second appeal.

8. At the time of admission, as stated above, the aforesaid questions of law were framed and formulated by the court. I extensively heard Mr. Sanglikar, Mr. Anne and Mr. Siodia for HPCL. I will deal with their respective submissions while considering each of the above questions of law.

9. The first and second substantial questions of law are as under:

(1) Was it right and proper for the Courts below to consider the material fact that the earlier suit being R.C.S. No. 120 of 1990 was barred by limitation and therefore, under Section 27 of the Limitation Act, the respondent - plaintiff's right to institute a suit for possession of the property had extinguished?

(2) Was it right and proper for the Courts below to hold that the present suit is not barred by limitation when the reliefs in earlier suit i.e. R.C.S. No. 120 of 1990 and the present suit i.e. R.C.S. No. 181 of 2000 are same and cause of action is same and reliefs claimed with respect to the suit property are same and when the earlier suit i.e. R.C.S. No. 120 of 1990 stands dismissed as being barred by the law of limitation?

. In this regard it was mainly contended by Advocate for HPCL and Mr. Sanglikar supporting HPCL that when first suit was barred by limitation whether the plaintiff had a right to institute a fresh suit for possession or whether that right is extinguished. It was argued by counsel for the appellants. A perusal of plaint in earlier first suit No. 120 of 1990, hereinafter referred to as "the first suit" will show that it was based on notice of termination dated 5.4.1978 given by the plaintiff and calling upon the

defendant to vacate the suit premises at the end of 31.7.1978 and handing over possession after restoration of the land to its original condition. This notice was given by the plaintiff under the Transfer of Property Act and the suit came to be filed on the basis of that cause of action given in paragraph 18 of the plaint in the first suit and it was instituted on 21.12.1990. Admittedly, that suit was dismissed. The appeal of the plaintiff was also dismissed and then writ petition which is filed, is still pending.

10. In this background, Advocate for the Appellant and Sanglikar contended that if the first suit was barred by limitation then whether the plaintiff was entitled to file second suit and whether his right to recover the possession is extinguished. As against this submission, Mr. Anne contended that though the first suit was filed after giving notice under Section 106 of Transfer of Property Act, there was no legal bar against the plaintiff in instituting the second suit by another notice of termination. He contended e.g. if the earlier notice of termination was not in conformity with the requirements of Section 106 of the Suit on that count fails. The landlord owner is not prevented by any provision of law from giving second notice and instituting the second suit. Therefore, according to Mr. Anne there is no legal bar in institution of the second suit.

11. As against this, so far as extinguishing of right of the plaintiff in the property is concerned, counsel for the appellant relied upon Section 27 of the Limitation Act 1963, it reads as under :

> *"***27. Extinguishment of right to property.-** *At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."*

12. Advocate for the appellant therefore contended that the notice of termination of tenancy for the first suit was given in 1978 then after 12 years the suit was filed and then that suit and the appeal came to be dismissed. The plaintiff gave another notice on 19.9.2000 and therefore since the period of 12 years for recovering possession has elapsed, right of the plaintiff to recover property stood extinguished under Section 27.

13. It is difficult to accept this contention, firstly, it is pertinent to note that none of the defendants in the second suit raised a plea of resjudicata. If the facts in the first suit and the second suit were identical and the cause of action was also identical, as argued by the appellant, then the appellants -

defendants could have raised plea of resjudicata but they have not raised that plea and obviously because the cause of action for both the suits is different. There is no bar under the provisions of Transfer of Property Act which can prevent or prohibit the landlord from filing successive suits on the basis of termination of notice because if the earlier notice is not legal and valid and has does not legally terminated the tenancy as required by Section 106 of the Transfer of Property Act, then the right of the landlord is not lost for ever and he will give fresh notice and terminate the tenancy and file a suit. Nothing contrary to this was shown to me by any of the lawyers for the original defendants excepting Section 27 of the Limitation Act, 1963, as stated and reproduced above.

14. Even Section 27 cannot come in the way of the plaintiff in instituting the second suit. It has to be noted that Section 27 is included in Part IV and the title of the Part IV is "*Acquisition of Ownership by possession".* There are in all three sections in this Part IV i.e. Sections 25, 26 and 27. I am reproducing both the Sections i.e. Sections 25 and 26 as below:

> "**25. Acquisition of easement by prescription.-** *(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without*

interruption, and for twenty years, and where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of lighter air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

(2) Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(3) Where the property over which a right is claimed under sub-section (1) belongs to the Government that sub-section shall be read as if for the words "twenty years" the words "thirty years" were substituted.

26. Exclusion in favour of reversioner of servient tenement.- *Where any land or water upon, over or from, which any easement has been enjoyed or derived has ben held under or by virtue of any interest for life in terms of years exceeding three years from the granting thereof the time of the enjoyment of such easement during the continuance*

of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interests or term resisted by the person entitled on such determination to the said land or water."

15. It has to be noted that first sentence in Section 27 refers to the following words:

"At the determination of the period hereby limited...."

The words hereby refer to the two kinds of suits referred in Sections 25 and 26 only and not to any other suit which owner can file against the trespasser or a tenant. If the legislature wanted that all the rights of the owners of the property should stood extinguished if the suits are not instituted within 12 years then such a provision would have been made separately in the Act and the words "*At the determination of the period hereby limited*" would not have been used. Those words clearly show that they are with reference to the rights enumerated in Sections 25 and 26. Therefore the objections raised by the appellant to both the decrees of the lower court in this regard, are required to be rejected. It has to be held that the right of the plaintiff to institute the second suit was nowhere and at any time extinguished but under Section 27 of the Limitation Act.

16. So far as second issue is concerned, it is also a part of issue No.1. When there is no bar or prohibition against the landlord in instituting the second suit, then merely because the first suit was dismissed, the second suit cannot be said to be barred by limitation. Cause of action for both the suits is altogether different and not identical and even if therefore purposes of the first suit and the second suit are common and the reliefs claimed are identical what makes a difference is the cause of action and the cause of action in the second suit was fresh notice given on 19.9.2000.

17. It was also contended by the appellants and supported by Mr. Sanglikar that if by the first notice relationship of landlord and tenant is terminated then nothing remains to be prevented by the subsequent notice and therefore the second notice is illegal. So also the subsequent suit. In fact there is no issue framed by the court while admitting the appeal in this regard as a substantial question of law which were framed after hearing the parties. However, since I have heard arguments on this point, this objection can be decided and disposed of.

18. As against this objection of the appellants, Mr. Anne contended that as between the issuance of the

first notice and the second notice, Bombay Rent Act came to be amended and substituted by Maharashtra Rent Control Act, which gave fresh cause of action to the plaintiff because he can institute a suit against HPCL for eviction as the protection given to them was withdrawn and taken away because their share capital exceeded Rs.1 crore.

19. Mr. Sanglikar streneously and repeatedly urged that there is no issue framed as to whether the protection granted to HPCL under the Bombay Rent Act stood withdrawn by the Amending Act, and, therefore according to him, in the absence of any issue, court could not have passed decree. He cited number of decisions in this regard as to the right of the court to frame issues. I do not think it necessary to go to these questions because parties to the second suit and all those parties to the first appeal and particularly appellant HPCL never raised that question that protection available to them under the Bombay Rent Act stood withdrawn by virtue of the Maharasthra Rent Control Act. The appellants HPCL cannot contend that their share capital is less than Rs.1 crore. They have not raised such a plea and therefore this objection and submission cannot be entertained at all. It is required to be rejected.

20. So far as substantial question No. (2) is

concerned, when the cause of action for filing second suit is totally different then the court below were perfectly justified in holding that the second suit was not barred by limitation at all.

21. The third substantial question of law is as under:

> *Whether the plaintiff could at the same time adopt two remedies for possession of the premises i.e. a writ petition challenging the orders passed in a suit filed for possession which came to be dismissed and during the pendency of the writ petition he could file a second suit on the same grounds the same cause of action?*

. In this regard it was contended by Advocate for HPCL and Mr. Sanglikar that the writ petition against the order in appeal arising out of dismissal of the first suit is still pending and therefore it was not open to the plaintiff to terminate the tenancy again and to file second suit. I have already held that cause of action for the second suit is altogether and totally different and there is no bar in landlord instituting the second suit on fresh and different cause of action. It was the choice of the landlord to wait till the decision of the writ petition and then

institute the suit but he has opted to terminate the tenancy again and filed second suit and there is no legal bar in doing so nor any prohibition of law in that regard against the landlord, therefore the third question is to be answered in the negative.

22. Question Nos. 4 and 5 are as under:

Whether the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act is unconstitutional and or ultra vires Articles 14 of the Constitution of India?

The appellants submit that Civil Appeal No. 8017 of 1992 filed by Crompton Greaves Limited challenging Section 3(1)(b) of the Maharashtra Rent Control Act is pending before the Hon'ble Supreme Court of India and has not been decided as of date?

. Neither the Advocate for the appellants nor Mr. Sanglikar made any submissions referring question Nos. 4 and 5. Mr. Anne had also no occasion to give any reply. Therefore, I hold that even those questions are framed, they are not required to be answered because no submissions whatsoever were made by Advocate for the appellant, Mr. Sanglikar or by Mr. Anne. However, Mr. Sanglikar repeatedly urged that Ideal Automobiles was in actual physical possession of the property and

they are protected tenants by virtue of Section 15 (1)(A) of the Bombay Rent Act. All these arguments of Mr. Sanglikar regarding right of his client M/s. Ideal Automobiles, are required to be rejected for two reasons. Firstly, as to what was actual relationship was between M/s. Ideal Automoticles and HPCL was a matter of agreement between them and Mr. Anne pointed out that the plaintiff had given notice to Ideal Automobiles to produce documents in that regard, but not a single document came to be produced by M/s. Ideal Automobiles showing the nature of relationship between them and HPCL. Therefore, Mr. Anne, rightly argued that adverse inference should be drawn against Ideal Automobiles and merely because they were on the property they cannot get any right.

23. Counsel for the plaintiff produced before me a certified copy of Exhibit 40D which was application by the plaintiff to the court to order the defendant No.2 to produce (1) the dealership agreement of 1971-72 (20.11.1972), (2) dealership agreement of 1974-75 between defendant No.1 and defendant No.2 in the suit, or dealership agreement which governs the relationship of the defendant Nos. 1 and 2 qua the suit land. The plaintiff was required to give this notice inspite of earlier notice to produce dated 5.4.2002, defendant No.1 did not produce document or defendant No.1 also did not produce these documents.

24. Non-production of documents by defendant Nos. 1 and 2 regarding the agreement between Defendant No.1 and 2 is a strong circumstance that goes against both the defendants and particularly, against Defendant No.2. Admittedly defendant No.1 was a lessee and when it gave a petrol pump for running to defendant no.2, it could not have conferred more rights to the defendant No.2 then which the defendant No.1 enjoyed. Defendant No.2 could not be in a position to claim anything claimed against defendant No.1. In case defendant No.1 wanted to oust him, therefore, when vital documents are not produced, it has to be inferred that, firstly, the documents were adverse to the claim and contention raised by defendant Nos. 1 and 2. Secondly, the document could not have clothed defendant No.2 with any legal right in the property much less the right of deemed tenant.

25. Apart from this, another thing that was brought to my notice was the say given by the defendant No.1 to this notice to produce Exhibit "40D". In that case the defendant No.1 has stated "..the Plaintiff in his suit had categorically mentioned that defendant no.2 has not independent right and he has been added as a party to avoid objection / obstruction to the execution proceedings". These submissions are not controverted by this defendant. Mr. Anne therefore pointed out

that the allegation of the plaintiff that defendant No.1 had no independent right were not controverted and if none of the defendants produce the vital documents then the claim and contention of the defendant No.2, in particular, about his right in the property required to be rejected. I do not see any reason to disagree with this submission of Mr. Anne.

26. Further it was pointed out to me by Mr. Anne that even though in the second appeal Ideal Automobiles is supporting the appellant and is making hue and cry about their right in the property, no oral evidence whatsoever was adduced in the second suit by Ideal Automobiles. Nobody on their behalf entered the witness box and now only on the basis of defences raised in the written statement they are trying to make a mountain of a mole hill i.e. no evidence or document to support their rights and contentions coming forth before the court. Mr. Sanglikar could not give any satisfactory reply as to why inspite of notice to produce documents, those documents which were vital and could have thrown light upon the nature of relationship between Ideal Automobiles and HPCL, were not produced before the court. Secondly, there is no satisfactory explanation at all as to why nobody led any evidence on behalf of Ideal Automobiles regarding their rights vis-a-vis HPCL vis-a-vis the Plaintiff. Therefore, when Ideal Automobiles had an opportunity to

substantiate their different contentions by producing documents and adducing evidence and when they have chosen not to produce the vital and important documents before the court and not to lead evidence then all the oral submissions raised, now are required to be rejected.

27. A perusal of the judgment of the trial court in the second suit No. 120 of 1990 shows that the plaintiffs examined Plaintiff No.1 whereas defendants did not examine any of the defendants or any witness in their behalf to prove their defence. In fact the trial court had framed as many as 21 issues on the basis of the pleadings of the parties. Though the burden of proving all those issues were on the plaintiff, Issue Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 were all pertaining to Defendant No.2 M/s. Ideal Automobiles. Apart from this, Ideal Automobiles are now raising contention that they are protected tenants. But the basic question is as to what was their right vis-a-vis the plaintiff and what was the nature of agreement executed between them and the appellant HPCL. Those documents, it has to be said has been suppressed from the court deliberately and intentionally because they could have frustrated all the defences raised by M/s. Ideal Automobiles.

28. This being an appeal any submissions can be made by

anybody with reference to his right but acceptance of those submissions, particularly, submissions claiming legal rights, rights arising out of certain facts require evidence and since there is absolutely no evidence, all the contentions of Mr. Sanglikar are required to be rejected.

29. Regarding maintainability of the second suit, my attention was drawn by Mr. Anne to an unreported judgment of **Justice Karnik in Criminal Revision Application No. 58 of 2004 Godrej & Boyce Mfg. Co. Ltd. vs. Sridhar Jagannath Neurkar dated 6.7.2004.** The question involved in that case was whether during the pendency of a suit filed by the landlord for eviction of tenant under the provisions of The Bombay Rents Hotel and Lodging House Rates Control Act, 1947 i.e. Bombay Rent Act, the landlord can file a second suit for eviction under the general law i.e. under the Transfer of Property Act against the tenant who is ceased to have protection of The Maharashtra Rent Control Act, 1999, Justice Karnik held that cause of action for both the said suits was different and therefore there was no bar in filing the second suit. It was tried to be urged by the Advocate for the appellants and Mr. Sanglikar that this judgment of Justice Karnik was firstly in Revision and second it had taken into consideration judgment of Justice Chandrachud dated 18.1.2002 in Dilip Prabhakar

Dingorkar vs. Hindustan Petroleum Corporation ltd. (C.R.A. No. 1191 of 2001) and it was against the order of stay. Therefore, judgment of Justice Chandrachud was on an interlocutory stage and those findings are not binding. I do not find any merit in this contention. Both Justice Chandrachud and Justice Karnik has taken the same view that second suit on separate and different cause of action is maintainable and that same view has to be followed. I also hold that the second suit is on the different cause of action.

30. It is pertinent to note that though both Mr. Siodia and Mr. Sanglikar repeatedly urged that after service of the first notice by the landlord, relationship of landlord and tenant came to an end, nowhere defendant No. 1 or defendant No.2 has claimed adverse possession and not at all claiming title on the basis of the adverse possession. Therefore, there is no denial of title by any of these persons. I am pointing out only as a circumstance borne out by the record.

31. Mr. Siodia contended that any action for ejectment, the plaintiff can recover possession only on the strength of his title and not by weakness of the case of the defendant. This contention is made on the basis of **AIR (29)1942 Privy Council 64 Lala Hem Chand**

vs. Lala Pearsy Lal and others. In that case the trustee had claimed adverse possession and then the owner had brought his suit and further in the instant case the plaintiff has succeeded on the strength of his own case. Both the courts have held in his favour. Therefore no question of taking advantage of the weakness of the defendant's case.

32. For all the reasons, the appeal is required to be dismissed. In the result, I pass the following order:

ORDER

. Second Appeal No. 1281 of 2004 is dismissed with costs as not maintainable.

. Second Appeal No. 615 of 2004 is dismissed with costs proportionately.

. After this order was pronounced, counsels for the appellant in both the appeals, prayed for staying the operation of this order or for continuation of the stay earlier granted for a period of three months because the Supreme Court is going to open on 17.7.2005.

. Looking to the facts and circumstances, the operation of the order is stayed upto 25.7.2005 on

condition that both the appellants either jointly or individually pay to the respective owners Rs.5,000/- per month towards compensation from the date of filing of the Appeal i.e. Appeal No. 615 of 2004 till 25.7.2005. All the arrears shall be paid within one month from today, otherwise the stay will stand vacated automatically.

6.5.2005 (D.G. DESHPANDE,J.)

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